Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–141 OF 2002
LOW HOP BING, ABDUL MALIK ISHAK AND SULAIMAN DAUD JJCA
21 NOVEMBER 2008

Contract — Quantum meruit — Nature of quantum meruit — Termination — Construction agreement — Whether appellant entitled to claim retention sum and balance of contract sum on quantum meruit basis

The respondent co-operative entered into a construction agreement ('the agreement') appointing the appellant contractor to build roads and drains on pieces of land owned by the respondent. The tenure of the agreement was for a period of two years with provisions for an extension of time in the event of delay due to causes outside the control of the appellant and the contract sum was RM1,666,444. The respondent also appointed a superintending officer, an engineer ('the engineer') to supervise the construction works undertaken by the appellant. When the agreement could not be completed within the stipulated time a supplementary agreement was entered into in order to extend the time for completion. However the respondent was unhappy and dissatisfied with the appellant's work and terminated the agreement with the appellant. The appellant then made a demand for payment and thereafter instituted an action against the respondent to recover, inter alia, the 10% retention sum, which was allegedly payable upon the termination of the agreement, payment for work done but not certified by the engineer, payment for work done under variation orders but not assessed and a further sum of RM6,355.86 being the balance unpaid under the architect's certificate. Although there was no specific provision in the agreement which dealt with retention monies it could be inferred from cl 33, which deals with payment that the respondent had the right to retain a small percentage of value for work done based on the engineer's certificate. When the trial judge held that the appellant was only entitled to half of the retention sum that it sought to claim, he had accepted the engineer's evidence. The trial judge also allowed the said sum of RM6,355.86 but dismissed the appellant's two other claims. This was the appellant's appeal against that decision. In respect of the retention sum the appellant argued that since the construction works were not completed and the agreement was terminated before its time cl 33 of the agreement did not apply. The appellant further argued that the retention

monies were deducted for the value of the works that were actually done and that being the case, the appellant was entitled to be paid the full sum pursuant to cl 23 of the agreement, which governs the termination of the contract and allows the appellant to be paid a fair price for construction works that were actually done by the appellant as determined by the engineer. With regard to the claims for payment in respect of work done, the appellant contended it was based on 'quantum meruit'. The three issues to be considered in this case were whether the trial judge had erred in releasing only half of the retention sum based on the recommendation of the engineer; whether the appellant was entitled to recover on quantum meruit for work done upon termination of the agreement by reason of its own default; and whether the appellant had failed to prove that it had carried out the works under the variation orders or that the respondent had not made payment in respect thereof.

Held, dismissing the appeal with costs:

(1) (per **Abdul Malik Ishak JCA**, concurring) Where the work was not completed as in the present case, cl 23 and cl 33 of the agreement must be read together in determining the payment of the retention monies. It was the prerogative of the respondent to terminate the contract at any time when the appellant failed to proceed with diligence as exemplified in cl 22 of the agreement, and the monies to be paid to the appellant would be determined by the engineer with the decision of the engineer to be final, binding and conclusive. At the same time it could be inferred from cl 33 of the agreement that the appellant was entitled to a pro rata payment for the value of the work he had done less a deduction for making good any defects or omissions as may be determined by the engineer. Therefore, the retention monies were those monies which have been earned and become due to the appellant but payment of which was deferred under the terms of the agreement until the final certificate of the engineer shall bear testimony that the works have been completed to the satisfaction of the engineer as exemplified in cl 33 of the agreement. Since the language employed in the agreement was not only unambiguous but also clear effect must be given to it and in particular cl 33 which sets out the condition for the release of the retention money (see paras 27, 30 & 33).

(2) (per **Abdul Malik Ishak JCA**, concurring) The appellant in seeking a quantum meruit was actually seeking a sum that will provide him the value of what he had done for the respondent. However, in this case, according to the agreement, without the engineer's certification the appellant's claim in quantum meruit was without basis and could not succeed. In addition if the appellant had done any work as claimed by

them, they ought to have it assessed immediately after the termination as provided in the agreement. The delay must be construed adversely against the appellant (see para 41).

(3) (per **Abdul Malik Ishak JCA**, concurring) In regard to the claims under the variation orders, the appellant had failed to prove on a balance of probabilities that it had carried out the works in question or that the respondent had failed to make payment in respect of the variation works. Further under cl 10 (ii) of the agreement the appellant as the contractor was required to forward to the respondent an account of the claims for carrying out variation works two clear days before their ordinary meeting in any month and any delay would be construed against the appellant. The discrepancies in the claims coupled with this delay further fortified the trial judge's finding that the appellant had not carried out the works under the variation order (see paras 52–53).

(4) (per **Sulaiman Daud JCA**, concurring) In the present case the respondent had elected to terminate the agreement under cl 23 instead of cl 22 of the agreement and by reason thereof the appellant was entitled to the payment of the fair price for the work actually done provided the engineer could verify the same. However, from a close scrutiny of the particulars of the appellant's claim it appeared that the appellant had not specifically stated the nature of the work allegedly completed but not assessed by the engineer and such an omission weakened the appellant's case against the respondent (see 77 & 81).

[Bahasa Malaysia summary

Responden sebuah koperasi telah memasuki satu perjanjian pembinaan ('perjanjian') dengan melantik perayu sebuah kontraktor untuk membina jalan dan perparitan di atas sebidang tanah yang dimiliki oleh responden. Tempoh perjanjian adalah untuk tempoh dua tahun dengan peruntukan lanjutan masa jika berlakunya kelewatan yang disebabkan di luar kawalan perayu dan jumlah kontrak adalah RM1,666,444. Responden juga telah melantik pegawai pengawasan, seorang jurutera ('jurutera') untuk menyelia kerja-kerja pembinaan yang dilaksanakan oleh perayu. Apabila perjanjian tidak dapat dilaksanakan dalam tempoh yang dinyatakan, satu perjanjian tambahan telah dimasuki bagi melanjutkan masa penyiapan. Walau bagaimanapun, responden tidak gembira dan tidak berpuas hati dengan kerja perayu dan menamatkan perjanjian dengan perayu. Perayu kemudiannya membuat tuntutan bagi bayaran dan kemudian memulakan tindakan terhadap responden untuk mendapatkan, antara lain, 10% wang tahanan, yang didakwa perlu dibayar apabila penamatan perjanjian, pembayaran untuk kerja yang telah laksanakan tetapi tidak disahkan oleh jurutera, bayaran untuk kerja yang telah dilaksanakan di bawah arahan variasi tetapi

tidak ditaksir dan jumlah selanjutnya sebanyak RM6,355.86 sebagai baki tidak berbayar di bawah pengesahan arkitek. Walaupun tidak terdapat peruntukan spesifik yang berurusan dengan wang tahanan ianya boleh disimpulkan daripada klausa 33, yang berurusan dengan pembayaran bahawa responden mempunyai hak untuk menahan peratusan kecil nilai kerja yang telah dilakukan berdasarkan pengesahan jurutera. Apabila hakim bicara memutuskan bahawa perayu hanya berhak kepada separuh daripada wang tahanan yang dipohon untuk dituntut, beliau telah menerima keterangan jurutera. Hakim bicara juga membenarkan jumlah RM6,355.86 tersebut tetapi menolak dua tuntutan perayu yang lain. Ini adalah rayuan perayu terhadap keputusan tersebut. Berkenaan dengan wang tahanan perayu menegaskan bahawa apabila kerja-kerja pembinaan tidak disiapkan dan perjanjian telah ditamatkan sebelum masanya, klausa 33 perjanjian tidak terpakai. Selanjutnya perayu menegaskan bahawa wang tahanan adalah ditolak untuk nilai kerja-kerja yang sebenarnya dilakukan dan jika itu sebenarnya, perayu adalah berhak dibayar bayaran penuh menurut klausa 23 perjanjian, yang mengawal selia penamatan kontrak dan membenarkan perayu dibayar harga yang munasabah bagi kerja-kerja pembinaan yang sebenarnya dilakukan oleh perayu seperti yang ditetapkan oleh jurutera. Berkenaan dengan tuntutan untuk bayaran bagi kerja yang telah dilaksanakan, perayu menegaskan bahawa ianya berdasarkan kepada 'quantum meruit'. Tiga isu yang perlu dipertimbangkan di dalam kes ini adalah sama ada hakim bicara telah terkhilaf dalam melepaskan hanya separuh jumlah wang tahanan berdasarkan kepada cadangan jurutera; sama ada perayu berhak untuk mendapatkan kembali berdasarkan quantum meruit bagi kerja-kerja yang telah dilaksanakan apabila penamatan perjanjian dengan sebab kemungkirannya sendiri; dan sama ada perayu telah gagal untuk membuktikan bahawa ianya telah melaksanakan kerja-kerja di bawah arahan variasi atau bahawa responden tidak membuat bayaran berkenaan dengannya.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdul Malik Ishak HMR**, bersetuju) Di mana kerja yang tidak disiapkan seperti di dalam kes ini, klausa 23 dan klausa 33 perjanjian mestilah dibaca bersama dalam memutuskan pembayaran wang tahanan. Ianya adalah prerogatif responden untuk menamatkan kontrak pada bila-bila masa apabila perayu gagal untuk meneruskannya dengan tekun seperti yang dinyatakan di dalam klausa 22 perjanjian, dan wang yang perlu dibayar kepada perayu akan ditentukan oleh jurutera dengan keputusan jurutera adalah muktamad, mengikat dan konklusif. Pada masa yang sama ianya boleh disimpulkan daripada klausa 33 perjanjian bahawa perayu berhak untuk bayaran yang sama rata bagi nilai kerja yang dilakukannya dipotong bagi tolakan untuk

membetulkan mana-mana kecacatan atau yang tidak dilakukan seperti yang ditetapkan oleh jurutera. Oleh itu, wang tahanan adalah wang yang diperolehi dan menjadi tertunggak kepada perayu tetapi bayarannya adalah tertangguh di bawah terma perjanjian sehingga pengesahan terakhir jurutera yang memperakui bahawa kerja-kerja telah disiapkan mencapai kepuasan jurutera seperti yang dinyatakan di dalam klausa 33 perjanjian. Oleh kerana bahasa yang digunakan di dalam perjanjian bukan saja tidak kabur tetapi adalah jelas, kesan mestilah diberikan kepadanya terutama klausa 33 yang menyatakan syarat bagi pelepasan wang tahanan (lihat perenggan 27, 30 & 33).

(2) (oleh **Abdul Malik Ishak HMR**, bersetuju) Perayu dalam memohon quantum meruit sebenarnya memohon satu jumlah yang memberikannya nilai kepada apa yang telah dilakukan untuk responden. Walau bagaimanapun, dalam kes ini, menurut perjanjian, tanpa pengesahan jurutera tuntutan perayu dalam quantum meruit tersebut tidak berasas dan tidak boleh berjaya. Selanjutnya, jika perayu telah melakukan apa-apa kerja yang dituntut oleh mereka, mereka patut menaksirkannya dengan segera selepas penamatan seperti yang diberikan di dalam perjanjian. Kelewatan metilah ditafsirkan secara bertentangan terhadap perayu (lihat perenggan 41).

(3) (oleh **Abdul Malik Ishak HMR**, bersetuju) Berkenaan dengan tuntutan di bawah arahan variasi, perayu telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa perayu telah menjalankan kerja-kerja yang dipersoalkan atau responden telah gagal untuk membuat bayaran berkenaan dengan kerja-kerja variasi. Selanjutnya, di bawah klausa 10 (ii) perjanjian perayu sebagai kontraktor dikehendaki untuk mengemukakan kepada responden akaun tuntutan bagi perlaksanaan kerja-kerja variasi dua hari penuh sebelum mesyuarat biasa mereka di dalam mana-mana bulan dan mana-mana kelewatan akan ditafsirkan terhadap perayu. Percanggahan di dalam tuntutan disertakan bersama dengan kelewatan ini menguatkan keputusan hakim bicara bahawa perayu tidak menjalankan kerja-kerja di bawah arahan variasi (lihat perenggan 52–53).

(4) (oleh **Sulaiman Daud HMR**, bersetuju) Di dalam kes ini, responden telah memilih untuk menamatkan perjanjian di bawah klausa 23 dan bukan klausa 22 perjanjian dan berdasarkan alasan tersebut, perayu berhak kepada bayaran harga yang munasabah bagi kerja sebenar yang telah dilaksanakan jika jurutera boleh mengesahkannya. Walau bagaimanapun, daripada penelitian rapi butiran tuntutan perayu ianya menunjukkan bahawa perayu tidak menyatakan secara spesifik sifat kerja yang didakwa telah disiapkan tetapi tidak ditaksirkan oleh jurutera dan kegagalan tersebut melemahkan kes perayu terhadap responden (lihat perenggan 77 & 81).]

Notes

For a case on nature of quantum meruit, see 3(2) *Mallal's Digest* (4th Ed) para 4661

Cases referred to

Afshar MM Tacki v Dharamsey Tricamdas AIR 1947 Bombay 98 (refd)

Alexander Thorn v The Mayor and Commonalty of London (1875–1876) LR 1 App Cas 120, HL (refd)

Bipin Behari Deb v Masrab Ali & Ors AIR 1961 Assam 173 (refd)

Burns Fry Ltd v Khurana (1985) 51 OR (2d) 257; Ont Rep Lexis 38 (refd)

Campbell, Albo, Low Limited v Black (1995) 26 OR (3d) III (General Division); [1995] Ont Rep Lexis 37 (refd)

Cana Construction Co v R [1974] SCR 1159; 37 DLR (3d) 418, SC (refd)

Capital Construction and Foundations Ltd v Jacques Cote and Stella Cote [1992] NBR (2d) Lexis 771; 124 NBR (2d) 204; 124 RNB (2e) 204; 312 APR 204 (refd)

Central Bank of India Ltd Amritsar, The v The Hartford Fire Insurance Co Ltd AIR 1965 SC 1288 (refd)

Craven-Ellis v Canons Ltd [1936] 2 KB 403, CA (refd)

F Ranchoddas v Nathmal Hirachand & Co AIR 1949 Bombay 356 (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 6 AMR 781, FC (refd)

Gilbert & Partners (a firm) v Knight [1968] 2 All ER 248, CA (refd)

Glynn & Ors v Margetson & Co & Ors [1893] AC 351, HL (refd)

Greenmast Shipping Co SA v Jean Lion Et Cie SA (The 'Saronikos') [1986] 2 Lloyd's Rep 277 (refd)

Hoenig v Isaacs [1952] 2 All ER 176, CA (refd)

Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation & Ors (1981) 18 BLR 80 (refd)

Hong Chuan Lay v Dr Eddie Soo Fook Mun [2006] 2 MLJ 218, CA (refd)

J & J Penner Construction Ltd v Cringan [1994] 93 Man R (2d) 252, QB (refd)

Jainarain Singh & Anor v The State of Bihar & Ors AIR 1980 Patna 24 (refd)

K Appukuttam Panicker & Anor v SKRAKR Athappa Chettiar & Ors AIR 1966 Kerala 303 (refd)

Lau Kee Ko & Anor v Paw Ngi Sui [1974] 1 MLJ 21, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Moffatt v Andrew Laurie & Anor (1855) ER 139; 15 CB 583 (refd)

(Nawab Major Sir) Mohammad Akbar Khan v Attar Singh & Ors AIR 1936 PC 171 (refd)

Neale v Richardson [1938] 1 All ER 753, CA (refd)

New India Sugar Mills Ltd v Commissioner of Sales Tax, Bihar AIR 1963 SC 1207 (refd)

Parkinson (Sir Lindsay) & Co Ltd v Commissioners of Works [1949] 2 KB 632, CA (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57, SC (refd)
Peter Lind & Co Ltd v Mersey Docks and Harbour Board [1972] 2 Lloyd's Rep 234 (refd)
Prenn v Simmonds [1971] 1 WLR 1381, HL (refd)
Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen), Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen) v Sanko Steamship Co [1976] 1 WLR 989, HL (refd)
Roberts v The Bury Improvement Commissioner (1870) LR 5 CP 310 (refd)
Rover International Ltd & Ors v Cannon Film Sales Ltd [1989] 1 WLR 912, CA (refd)
Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)
Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd, Trading as Nuclear Civil Constructors (a firm) v Atomic Power Constructions Ltd [1963] 1 WLR 333, QBD (refd)
Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd (1972) 9 BLR 20; 222 EG 169; [1972] EGD 257 (refd)
Union of India, The v Kishorilal Gupta & Bros AIR 1959 SC 1362 (refd)
Utica City National Bank v Gunn (1918) 118 NE 607, CA (refd)
Westview Holdings Ltd v John Mowbray and Saskatchewan Government Insurance [1991] Sask R Lexis 990 (refd)
William Lacey (Hounslow) Ltd v Davis [1957] 1 WLR 932, QBD (refd)

Legislation referred to
Evidence Act 1950 s 92

Appeal from: Civil Suit No 22–784 of 1998 (MT-1) (High Court, Pulau Pinang)

M Thayalan (Thayalan & Associates) for the appellant.
Fatimah Idris (Idris & Associates) for the respondent.

Abdul Malik Ishak JCA:

INTRODUCTION

[1] This is an appeal by the appellant contractor — the plaintiff at the High Court, against the decision of the learned judge of the High Court who held that the appellant contractor was only entitled to 5% and not 10% of the retention sum of RM127,944.41 which, calculation wise, came up to RM6,397.22. The learned judge of the High Court also held that the

appellant contractor was entitled to the unpaid balance under Certificate No 100/85 amounting to RM6,355.86 plus a further sum of RM6,355.

[2] But, the learned judge of the High Court dismissed the claims for works done and that would be categorised as follows:

(i) work done but not assessed amounting to RM193,000 (quantum meruit); and

(ii) work done under variation orders but not assessed which came up to RM83,538 (quantum meruit).

[3] The appellant contractor has appealed against the decision of the learned judge of the High Court to this court and the appeal focussed on:

(a) the refund of the balance of the 5% of the retention sum which amounts to RM6,397.22 ('the first issue');

(b) payment for work done but not certified by the engineer (quantum meruit) ('the second issue'); and

(c) payment for work done under variation orders amounting to RM83,538 but not assessed (quantum meruit) ('the third issue').

[4] I have read the judgment of my learned brother Sulaiman Daud JCA and wholeheartedly agree with the views which he held and has expressed in a clear language. I wish to add to what has been said and I shall do so now.

BRIEF FACTS

[5] The respondent employer (the defendant at the High Court), a cooperative, entered into an agreement dated 17 May 1985 with the appellant contractor to build roads and drains on pieces of land owned by the respondent employer. The tenure of the agreement was for a period of two years and the contract sum was for RM1,666,444.

[6] The agreement could not be completed within the stipulated time and a supplementary agreement was entered into in order to extend the time for completion.

[7] Unfortunately, the works did not proceed according to the schedule because there were several obstructions on the land. There were also delays and these delays were said to be due to the appellant contractor.

[8] The respondent employer was not satisfied with the appellant contractor's work and the superintending officer by the name of Mr Yow Ah

Choong (SP2), an engineer, was aware of this and he had counselled the respondent employer to avoid any legal disputes.

[9] Unhappy with the progress at site, the respondent employer terminated the agreement with the appellant contractor by letter dated 20 June 1994 as reflected at p 18 of the appeal record ('AR').

[10] Upon receipt of the notice of termination, the appellant contractor appeared, initially, to have accepted the termination. But this was not the case. The appellant contractor made a demand for payment by way of their solicitor's letter dated 8 October 1996.

[11] It was only on 30 September 1998, that the appellant contractor filed their claim in the High Court against the respondent employer.

[12] On 24 December 1998, after filing their belated action that the appellant contractor sent their claim to SP2 for certification.

THE AGREEMENT DATED 17 MAY 1985

[13] The language employed in the agreement must be properly construed. The crucial question to pose would be whether the action complained of is or is not in consonance with the terms of the agreement (*New India Sugar Mills Ltd v Commissioner of Sales Tax, Bihar* AIR 1963 SC 1207).

[14] It is trite law that the words used in a contract must be interpreted literally and without the aid of the principles of natural justice (*Jainarain Singh & Anor v The State of Bihar & Ors* AIR 1980 Patna 24). And the court in order to avoid superfluity must give effect to every provision of the contract. The court cannot construe words in an entirely different sense from their natural and grammatical meaning. Thus, the word 'when' could not be read as 'if'. It must be borne in mind that the court cannot give meaning to a provision totally contrary to the meaning which it bears in plain language (*F Ranchoddas v Nathmal Hirachand & Co* AIR 1949 Bombay 356).

[15] Of course, it is trite that when interpreting a contract the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behari Deb v Masrab Ali & Ors* AIR 1961 Assam 173).

[16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. To allow such evidence would involve the plain violation of s 92 of the Evidence Act 1950 (*Afshar MM Tacki v Dharamsey Tricamdas* AIR 1947 Bombay 98).

[17] From the available authorities, the following propositions may be advanced in construing a contract where the language employed is clear:

(a) the court must give effect to the plain meaning of the words, no matter how distasteful the result may be (*The Central Bank of India Ltd Amritsar v The Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288);

(b) where the language in the document is unambiguous and clear, the real nature of the document is to be determined solely by looking at its contents, uninfluenced by any intention of the parties (*(Nawab Major Sir) Mohammad Akbar Khan v Attar Singh & Ors* AIR 1936 PC 171);

(c) when the minds of the parties are expressed in an unambiguous manner, the court cannot override the declared intention of the parties unequivocally expressed (*K Appukuttam Panicker & Anor v SKRAKR Athappa Chettiar & Ors* AIR 1966 Kerala 303); and

(d) there is no scope, at all, for drawing upon hypothetical considerations or the supposed intention of the parties when the words contained in the contract are clear and unambiguous (*The Union of India v Kishorilal Gupta & Bros* AIR 1959 SC 1362).

[18] I have said that the general rule is that extrinsic evidence will not be admitted to contradict or vary the clear terms of an agreement. Similarly, evidence of prior negotiations will not be accepted to explain the meaning of the ambiguous wording. It is not unusual in a case of disputed interpretation to find a party contending for his own interpretation the true construction of the words used or, in the alternative, the same party claiming rectification of the contract will insist that the court should examine closely the preceding negotiations in order to ascertain whether the agreement allows rectification. A classic example can be seen in the case of *Prenn v Simmonds* [1971] 1 WLR 1381.

[19] But, while in cases of doubt as to the meaning of an agreement, the rule has always been that prior negotiations cannot be looked at yet the general background and surrounding circumstances of the contract can and will be taken into consideration. Indeed this seems to be the approach of Lord Wilberforce in *Prenn v Simmonds* at p 1385, citing Cardozo J's seminal

'genesis and aim of the transaction' in *Utica City National Bank v Gunn* (1918) 118 NE 607, and this was what Lord Wilberforce said:

> In my opinion, then, evidence of negotiations, or of the parties' intentions, … ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

[20] Again, Lord Wilberforce in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen), Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen) v Sanko Steamship Co* [1976] 1 WLR 989, at pp 995–996, aptly said:

> In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[21] There is also a rule of evidence that should be mentioned here. It is this. That the whole of the contract should be examined before construing an individual part of it (per Lord Halsbury in *Glynn & Ors v Margetson & Co & Ors* [1893] AC 351, at p 357).

[22] I have perused through the agreement dated 17 May 1985 and I need to reproduce cll 21, 22, 23 and 33 herein. I shall do so now (see pp 75, 76, 78 and 79 of 'AR'):

> 21 Suspension of Works
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> The Engineer may by notice in writing suspend the work during inclement weather or in the event of a strike taking place amongst the workmen employed in the execution of the said works, or from any other cause that he may find it necessary so to do; the Contractor to be allowed such further or additional time for the completion of the contract as in the opinion of the Engineer may be necessary, but such extension of time shall not in any way vacate, lessen, or otherwise affect the validity of this contract.
>
> 22 Failure to proceed with diligence
>
> If in the opinion of the Engineer the Contractor shall —
>
> (a) Fail to proceed with the work with due diligence,
>
> (b) Fail to carry out the work or any part thereof in a satisfactory and workmanlike manner,
>
> (c) Make use of defective material or materials below specification,
>
> (d) Commit any breach of his agreement,

then and in either or any of such cases, the Employer shall have power to determine his agreement and to enter in and to take possession of the site and take the work wholly or partly out of the hands of the Contractor or employ additional workmen thereon at the expense of the Contractor or engage or employ any other Contractor or persons or workmen and produce all requisite materials and implements for the due execution and completion of the works and the cost and charges incurred in so doing shall be finally settled by the Engineer's Certificate and paid for or allowed to the Employer by the Contractor and the Employer may deduct the amount of such costs and charges out of any monies, due or to become due from the Employer to the Contractor under this or any other Contract.

In case the Employer shall take the works wholly out of the hands of the Contractor the Employer may give the Contractor notice in writing requiring him and his servants to quit the works and if they fail to do so they may be treated as trespassers.

A certificate of the Engineer under sub-paragraphs (a), (b) and (c) shall be conclusively proofs as between the Contractor and the Employer of the Statements contained in it.

23 Termination of Contract

The Employer shall be at liberty to terminate the contract at any time should they find it necessary or advisable to do so even if the Contractor has not failed in any of the foregoing particulars specified in Clause 22 and (in) this case the Employer shall pay a fair price for the work actually done and materials supplied and make a fair allowance for waste of time and labour incurred by the Contractor in connection with the work but shall not pay for prospective profits which the Contractor might have made had the work proceeded. The amount to be paid to the Contractor shall be determined by the Engineer who shall have regard to the schedule of prices included in the contract and whose decision shall be final, binding and conclusive.

33 Payment

Subject to the conditions of the Specification, the Contractor shall be entitled to payment as follows:

An instalment of 80 per cent of the value of such work as in the opinion of the Engineer shall have been satisfactorily executed (to the best of his knowledge) which sum shall be paid within four days of the meeting of Employer following the date of certificate.

After the first payment certificate shall given monthly if required. On satisfactory completion of the work, the Contractor shall be entitled to be paid up to 90 per cent of the value of the work.

The balance of 10 per cent shall be paid after expiry of six calendar months from the date of the Engineer's Certificate of Completion, provided that the Engineer shall certify that the works are then in complete repair and to his satisfaction in every respect.

> The Engineer shall have the power to refuse to grant a certificate at any time during the contract, if the works are not progressing or being executed to this satisfaction.
>
> The certificate of the Engineer shall be a conditions precedent to payment.
>
> The Engineer's certificate shall not relieve the Contractor from the obligation to complete the works satisfactorily, nor from any liability which he would otherwise incur in consequences of any default whether discovered during or after the expiry of the period of maintenance.

[23] I shall allude to these clauses in this judgment.

ANALYSIS

[24] Sulaiman Daud JCA made an excellent analysis of the first issue. I wholeheartedly share his views and his conclusions on this issue.

[25] Clause 33 of the agreement makes reference to the balance of 10% that shall be paid after the expiry of the six calendar months from the date of the engineer's certificate of completion provided that the engineer (SP2) shall certify that the works are completed and to his satisfaction. It is clear that the intention of this part of cl 33 is to provide for partial payment during the construction period of building the roads and the drains and to defer full payment of a final balance until completion. This is to confer a small degree of commercial security on the respondent employer against possible breaches or failures on the part of the appellant contractor in fulfilling the contract.

[26] The learned judge of the High Court allowed the release of only half of the retention money and it is obvious that His Lordship had accepted the evidence of the engineer. In the face of the submissions that the construction works were not completed and that the agreement was terminated before its time, the appellant contractor argues that cl 33 governing retention does not apply. The appellant contractor further argues that the retention moneys were deducted for the value of the works that were actually done and that being the case, the appellant contractor says that it is entitled to be paid the full sum pursuant to cl 23 of the agreement.

[27] It is wrong for the appellant contractor to read cl 23 of the agreement in isolation. Clause 23 must be read together with cl 33 of the agreement in ascertaining the payment of the retention moneys. It is the prerogative of the respondent employer to terminate the contract at any time when the appellant contractor failed to proceed with diligence as exemplified in cl 22

of the agreement. And the moneys to be paid to the appellant contractor would be determined by the engineer and the decision of the engineer shall be final, binding and conclusive.

[28] In allowing the payment of half of the retention moneys, the learned judge of the High Court relied on the engineer's letter addressed to the respondent employer dated 31 December 1990 which reads as follows, 'we only agreed to the release of 5% of the retention money, subject to the approval of the committee concerned'. And by virtue of cl 33 of the agreement, it is the engineer who has the power to refuse to grant a certificate at any time during the contract if the works are not progressing or being executed to his satisfaction. And pursuant to cl 23 of the agreement, the parties have mutually agreed to be bound by the decision of the engineer.

[29] It must be borne in mind that the letter dated 31 December 1990 was drafted by way of a response to the appellant contractor's request to the respondent employer for the payment of the retention sum based on the engineer's certificate dated 10 April 1990. And at the time of such request the construction works have not been completed and the agreement has not been terminated as yet.

[30] It is my judgment that the appellant contractor is entitled to payment *pro rata* as the work proceeds, less deduction for the retention money. But the appellant contractor is not entitled to the retention money until the work is completed and entirely finished, without defects or omissions. And the certificate of the engineer shall bear testimony that the works have been completed to the satisfaction of the engineer as exemplified in cl 33 of the agreement. In *Hoenig v Isaacs* [1952] 2 All ER 176 at p 181 (CA), the English Court of Appeal held that the sum of £400 that was not paid by the employer could not be treated as retention money because it formed so large a proportion of the contract sum. And if the parties so desired they could expressly make such a large sum as retention money. Here, before us, cl 33 of the agreement mirrors the intention of the parties to retain 10% as retention money.

[31] I am of the considered view that retention moneys are those moneys which have been earned and become due to the contractor but payment of which is deferred under the terms of the contract until the final certified completion has occurred (see *Cresswell on Building Contracts* (5th Ed), at p 24). According to *Halsbury's Laws of England* (2nd Ed) Vol 3, at p 260, retention money is generally payable to the contractor when the whole work is completed in accordance with the terms and conditions of the contract, except where there is a stipulation postponing the time for payment of the

whole or a part thereof, until after the expiration of a period during which the contractor is liable for defects or for repairs or after the period of maintenance mentioned in the contract.

[32] And as to the time when the retention money becomes payable, depends on the contract. If there is no mention about its payment, then it will become payable after the actual completion of the work according to the terms and conditions of the contract. However, if the contract provides that retention money shall become payable upon 'practical completion' which is equivalent to 'substantial completion', then the contractor shall be entitled to get back his retention money on the completion of the work, subject to any provision for the maintenance period that may be set out in the contract. Here, cl 33 of the agreement sets out the condition for the release of the retention money and the parties must comply with it accordingly.

[33] It is part and parcel of my judgment that the learned judge of the High Court has not erred in releasing only half of the retention money based on the recommendation of the engineer. The language employed in the agreement is not only unambiguous, it is also clear. Consequently, effect must be given to it, no matter how distasteful the result may be. The learned judge of the High Court has arrived at the correct conclusion in regard to the first issue and this court must affirm it accordingly.

[34] I shall now refer to the second issue.

[35] It must be recalled that the respondent employer terminated the agreement on 20 June 1994. And that the appellant contractor made a demand for payment on 8 October 1996. Calculation wise, the delay would be in the region of two years three months and 18 days.

[36] And, it was on 30 September 1998 that the appellant contractor filed their claim in the High Court against the respondent employer. The delay would be for four years three months and ten days calculated from 20 June 1994 to 30 September 1998.

[37] The appellant contractor sent their claim to the engineer (SP2) for certification only on 24 December 1998. The delay is apparent. It is for a period of four years six months and four days calculated from 20 June 1994 to 24 December 1998.

[38] Indeed if the appellant contractor had done any work as claimed by them, then they ought to have it assessed immediately after the termination as provided for in the agreement. The delay must be construed adversely against the appellant contractor.

[39] According to the case of *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248 (CA), a claim on a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum. The facts in *Gilbert & Partners (a firm) v Knight* may briefly be stated as follows. There, a surveyor agreed to prepare drawings, arrange tenders and supervise works pertaining to alteration, the cost of which he estimated at roughly £600, for a fee of £30. The employer ordered extra work which brought the total cost to £2,283 but the surveyor did not, while the work was going on, tell the employer that he would require further fees. The court held that the surveyor would be bound by the existing agreement to perform services for £30 and could not recover a reasonable sum on a new implied contract.

[40] However, there may be a quantum meruit claim in the following situations:

(a) when there is an express agreement to pay a reasonable sum;

(b) when no price is fixed (thus, if the contractor does work under a contract express or implied and no price is fixed by the contract, the contractor is entitled to be paid a reasonable sum for his labour and the materials supplied (*Moffatt v Andrew Laurie & Anor* (1855) ER 139; 15 CB 583; *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd* (1972) 9 BLR 20; 222 EG 169; [1972] EGD 257; and *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation & Ors* (1981) 18 BLR 80);

(c) in a quasi-contract situation (a classic example would be when work is carried out while negotiations as to the terms of the contract are proceeding but agreement is not reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out (*Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd, Trading as Nuclear Civil Constructors (a firm) v Atomic Power Constructions Ltd* [1963] 1 WLR 333; and *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234);

(d) when work is performed outside a contract (thus, in a situation where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract (*Alexander Thorn v The Mayor and Commonalty of London* (1875–1876) LR 1 App Cas 120 at p 127 (HL); *Parkinson (Sir Lindsay) & Co Ltd v Commissioners of Works* [1949] 2 KB 632 (CA); *Greenmast Shipping Co SA v Jean Lion Et Cie SA (The 'Saronikos')* [1986] 2 Lloyd's Rep 277; and *Cana Construction Co v R* [1974] SCR 1159; 37 DLR (3d) 418, Supreme Court of Canada); and

(e) when work is done under a void contract (this envisages the situation where a contractor carries out work or renders services under a contract subsequently found to be void, the contractor is entitled to a quantum meruit for the work or services (*Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (CA); and *Rover International Ltd & Ors v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA)).

[41] Here, everything depends on the certification by the engineer. Without the engineer's certification, the appellant contractor's claim purportedly in quantum meruit is without basis. A claim in quantum meruit would be made on the basis that the respondent employer had derived a benefit from the work done by the appellant contractor and; if this is so, a reasonable remuneration has to be paid to the contractor. But the learned judge of the High Court found that there was no evidence to support the appellant contractor's claim for quantum meruit. We agree with the findings of the learned judge of the High Court in regard to the second issue. In its original text, this was the learned judge of the High Court said (see p 5–6 of the additional appeal record):

> Plaintif tahu adalah 'condition precedent' sebelum bayaran dibuat SP2 hendaklah meluluskannya. Tanpa verification dan kelulusan dari SP2, mahkamah ini tidak berpuashati plaintif telah melaksanakan kerja-kerja itu. Saya mengambilkira bahawa defendan telah membayar plaintif sebanyak RM1.27 juta berdasarkan kepada kerja yang diluluskan oleh SP2. Saya juga meragui tuntutan plaintif kerana selepas penamatan perjanjian oleh defendan, plaintif tidak langsung menulis surat kepada SP2 selama 4 tahun mengenai apa-apa tuntutan plaintif kepada defendan yang perlu diluluskan oleh SP2. Saya menolak pemakaian tuntutan quantum meruit kerana saya tidak berpuashati plaintif telahpun membuat kerja-kerja itu. Tanpa pengesahan dan kelulusan oleh SP2 saya enggan menerima keterangan SP1 tanpa bukti.

[42] Still on quantum meruit, I have this to say.

[43] The term 'quantum meruit' is a Latin term. In Latin, it means 'how much he desires'. It is a common terminology in an action of general assumpsit to recover payment for the value of labour and services.

[44] It must be borne in mind that when the appellant contractor is seeking a quantum meruit it is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. And this is usually calculated by reference to the market price or value of the services (see JW Carter, *Ineffective Transactions*,

in PD Finn, ed, *Essays on Restitution* (North Ryde, NSWThe Law Book Company Limited 1990, 206 at pp 235–240)).

[45] It goes without saying that a quantum meruit claim may be contractual as in the case of *J & J Penner Construction Ltd v Cringan* [1994] 93 Man R (2d) 252 (QB) where the whole scenario was governed by a contract between the parties but they had not fixed the price for the services rendered by the plaintiffs there. It is also prudent to read *Campbell, Albo, Low Limited v Black* (1995) 26 OR (3d) III (General Division); [1995] Ont Rep Lexis 37; and *Westview Holdings Ltd v John Mowbray and Saskatchewan Government Insurance* [1991] Sask R Lexis 990; at p 94 Sask R 263, Saskatchewan Court of Queen's Bench, Judicial Centre of Regina.

[46] And a quantum meruit claim may also be restitutionary (*Capital Construction and Foundations Ltd v Jacques Cote and Stella Cote* [1992] NBR (2d) Lexis 771; 124 NBR (2d) 204; 124 RNB (2e) 204; 312 APR 204).

[47] I will now demonstrate the difference between what is known as contractual quantum meruit and restitutionary quantum meruit. For this purpose, I will refer to two authorities. One from England and the other is from Canada.

[48] In *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, an English case, the facts may be stated as follows. The plaintiffs there rendered services to the defendant at the latter's request in anticipation of a building contract that failed to materialise. When the plaintiffs there sued for payment for the services rendered, the defendant argued that it was the common expectation of the parties that a contract would be entered into between them and that the plaintiffs' services would be rewarded by the profits of the contract. The defendant denied vehemently that there was any implied promise to pay for the services. The defendant argued that any quantum meruit claim was necessarily contractual and that any such claim was negated by the fact that the parties had an express contract in mind which made it impossible to imply otherwise. This argument was rejected by the court. The court explained that quantum meruit, though contractual in origin, had given rise to another form of action founded upon what was known, in 1957 when the case was being determined, as quasi-contract. In quasi-contractual instances of the application of quantum meruit, the court looked at the facts and then ascertained from them whether or not a promise to pay should be implied, irrespective of the actual views or intention of the parties at the time when the work was done and the services rendered.

[49] The next case would be the Canadian case of *Burns Fry Ltd v Khurana* (1985) 51 OR (2d) 257; Ont Rep Lexis 38. That case concerned both contractual and restitutionary claims by the plaintiffs based upon their acts as agents for the defendant in the sale of a business. An agreed fee was payable upon the closing of the transaction. The plaintiffs found a purchaser willing to pay approximately the price asked for the business by the defendant. Unfortunately, the defendant changed his mind and decided not to sell. Krever J, rejected both claims. According to His Lordship, the defendant had acted in good faith and was not in breach of any implied term of the contract.

[50] So much for the law on quantum meruit. It can go on ad infinitum.

[51] Now, bereft of the engineer's certificate, the appellant contractor's claim for quantum meruit as per the second issue must fall like a deck of cards. It cannot succeed.

[52] In regard to the third issue, on the balance of probabilities, the appellant contractor failed to prove that it has carried out the variation works and the appellant contractor too failed to prove that the respondent employer has not made payment in respect of the variation works.

[53] The appellant contractor's claim under the third issue, must be governed by cl 10 of the agreement. Clause 10(i) of the agreement (see p 72 of 'AR') stipulates that no variation from the drawings and specification(s), or in the mode of carrying them, is to be made by the appellant contractor without an order in writing signed by the engineer and the appellant contractor shall not be entitled to demand or receive payment in respect of such variation unless he shall have obtained such written order. There were letters from the engineer dated 30 October 1985 (see p 87 of 'AR') and dated 16 September 1986 (see pp 88–90 of 'AR') which showed the total costs to be RM42,674.70 and RM146,428.85 respectively — giving a grand total of RM189,103.55 only. There was also a letter from the engineer dated 22 October 1985 showing a variation order of RM130,629.08 as evidenced at pp 85–86 of 'AR' and this amount, unfortunately, was not reflected in the appellant contractor's letter dated 24 December 1998 as seen at p 185 of 'AR'. And this was not explained by the appellant contractor.

[54] To add insult to injury, there was also a delay on the part of the appellant contractor in not complying with cl 10(ii) of the agreement (see p 72 of 'AR') which requires the appellant contractor to forward to the respondent employer two clear days at least before their ordinary meeting in any month for extra payment for carrying out any such variations of the contract and any delay would be construed against the appellant contractor.

[55] With all these drawbacks, it was not surprising that the learned judge of the High Court dismissed the appellant contractor's claim pertaining to the third issue and I totally agree with him.

CONCLUSION

[56] I must accordingly dismiss the appellant contractor's appeal with costs. I agree with all the orders made by my learned brother Sulaiman Daud JCA and I too make those orders accordingly.

[57] This supporting judgment in draft has been shown to my learned brothers Low Hop Bing JCA and Sulaiman Daud JCA and they have kindly expressed their agreement with it.

Sulaiman Daud JCA:

[58] The appellant brought this action against the respondent to recover a total sum of RM 411,228.36 under a construction agreement entered between the parties. The particulars and breakdown of the claims are as follows:

(a)	10% nett retention moneys	RM127,944.41;
(b)	Work done but not assessed	RM193,000;
(c)	Work done under variation orders but not assessed	RM83,538;
(d)	Balance unpaid under Architect Certificate No 100/85	RM6,355.86
	Total	RM411,228.36

[59] In a written judgment dated 10 January 2003, the learned judge held that the appellant was only entitled to half of the retention moneys in item (a), and a further sum of RM6,355 for the unpaid balance in item (d) above. The claims for works done in items (b) and (c) were however dismissed. The appellant appealed against the decision.

[60] The essential facts relevant to this appeal are substantially not disputed. By an agreement in writing dated 17 May 1985 ('the agreement'), the respondent employed the appellant as the contractor for the supply of materials and the construction and completion of certain roads and drainages ('the construction works') of a housing scheme undertaken by the respondent for the contract sum of RM1,666,444. The construction works were to be completed within 24 months from the date of commencement of the works as may be ordered by the engineer engaged by the respondent ('the engineer'), with provisions for extension of time in the event of delay by causes outside the control of the contractor. By letters dated 22 October 1985, 30 October

1985 and 16 September 1986, the engineer issued three variation orders in accordance with the terms of the agreement at the extra costs of RM130,629.08, RM42,674.70 and RM146,428.85 respectively ('the variation orders'). A

[61] The appellant started work sometimes in 1985 but the completion date was delayed due to obstruction by water supply pipes and the presence of squatters at the site which caused such period to be extended from time to time commencing from 9 October 1987. No further extension was granted upon the expiry of the last extension period on 27 September 1993. Subsequently by a letter dated 20 June 1994, the respondent terminated the agreement pursuant to cl 23 thereof on two main grounds. First, it was alleged that the progress of the works were unsatisfactory, and secondly, that the contractor had ceased all works without any reasonable explanation. B C

[62] I will now consider the appeal on each of the learned judge's decision in turn. D

10% RETENTION SUM, WHETHER PAYABLE UPON TERMINATION E

[63] There is no specific provision in the agreement which deals with retention moneys. However the right of the respondent, as the employer, to retain small percentage of value for work done based on the engineer's certificate can be inferred from cl 33 of the agreement which provides as follows: F

> 33 Payment
>
> Subject to the conditions of the specification, the contractor shall be entitled to payment as follows: G
>
> An installment of 80 per cent of the value of such work as in the opinion of the engineer shall have been satisfactorily executed (to the best of his knowledge) which sum shall be paid within four days of the meeting of the Employer following the date of certificate.
>
> After the first payment certificate shall [be] given monthly if required. H
>
> On satisfactory completion of the work, the Contractor shall be entitled to be paid up 90% of the value of the work.
>
> The balance of 10 per cent shall be paid after the expiry of six calendar months from the date the engineer's Certificate of Completion, provided that the engineer shall certify that the works are then in complete repair and to his satisfaction in every respect. I

[64] As can be seen the scheme of payment aforesaid provides for progress payments to be made based on the value for work done as specified in the engineer's certificate to be issued at periodic intervals. In each progress payment the respondent is entitled to retain 10% of the sum so certified ('the retention moneys') such that upon completion of the construction works the appellant is only entitled to be paid 90% of the value of the works. The retention money will only be paid out after the construction works have been completed without defects or omission to the satisfaction of the engineer.

[65] The learned judge in allowing the release of half of the retention moneys accepted the engineer's evidence. He found him to be a neutral witness although he was called by the appellant to testify.

[66] Learned counsel for the appellant submitted that since the construction works were not completed and the agreement was earlier terminated, the said cl 33 does not apply. It is his contention that since the retention moneys were deducted for the value of works actually done, it must necessarily follow that the appellant is entitled to be paid the full sum thereof pursuant to cl 23 under which the contract was terminated. With respect I am unable to agree with him. The said cl 23 provides as follows:

> 23 Termination of contract
>
> The Employer shall be at liberty to terminate the contract at any time should they find it necessary or advisable to do so even if the Contractor has not failed in any of the foregoing particulars specified in clause 22 and [in] this case the Employer shall pay a fair price of the work actually done and material supplied and make allowance for waste of time and labour incurred by the contractor in connection with the work but shall not pay for prospective profits might have made had the work proceeded. The amount to be paid to the contractor shall be determined by the engineer who shall have regard to the schedule of prices included in the contract and whose decision shall be final, binding and conclusive.

[67] In my view where the work is not completed as in the present case, the said cl 23 must be read together with cl 33 in determining the payment of the retention moneys. It can be inferred from the said cl 33 that such retention moneys is set aside in each progress payment for the purpose of making good any defect or omission to the work so completed. Such costs must therefore be taken into account in determining the fair price for work done. In other words the contractor is only entitled to the value of the work less a deduction for making good any defects or omission as may determined by the engineer.

[68] The learned judge in allowing the payment of half of the retention moneys relied on the engineer's earlier letter dated 31 December 1990 to the respondent which reads as follows:

Tuan Setiausaha,

Koperasi Serbaguna Sungai Gelugor,

No. 2222, Jalan Gelugor,

11700 Pulau Pinang

Tuan,

Per: CADANGAN PROJEK JALAN & PARIT DI ATAS LOT 3353, 3444, &345 MUKIM 13 D.T.L. SUNGEI GELUGOR PULAU PINANG TUNTUTAN PEMULANGAN WANG TAHANAN 10% DARI JUMLAH KONTRAK MENGIKUT SIJIL AKHIR JURUTERA RUJ. PBM/031/4/89 BERTARIKH 10.4.90 SEBANYAK $113,792.94

With reference to your letter dated 13.12.90, ref. SBSG-SG.43/01/(29) 90, we wish to inform you that we only agreed to the release 5% of the retention money, subject to the approval of the committee concerned.

Thank you,

Yours faithfully'

sg

Ir Yow Ah Choong

[69] The said letter was in response to the appellant's request to the respondent for the payment of the retention sum based on the engineer's certificate dated 10 April 1990. It is to be noted that at the time of such request the construction works have not been completed and the agreement has not been terminated. In my view, in the absence of any other evidence, the recommendation made by the engineer for the payment of half of the retention moneys is the best evidence in determining the amount of retention moneys that can be paid to the appellant. To my mind the fact that the engineer has recommended the payment of only half of the retention money shows that the works so completed were not in complete repair then. The remaining sum is for the respondent's use to make good the defects in the works that have been so completed. It is my finding, therefore, that the learned judge has not erred in allowing the release of only half of the retention sum. I would add that although the engineer was appointed by the respondent to look after the respondent's interest in the construction works but the parties have agreed to be bound by the decision of the engineer by virtue of the said cl 23.

CLAIM FOR WORK DONE

[70] The appellant made two separate claims for works done by way of two separate letters both dated 24 December 1998 addressed to the engineer. The

first is a claim for work done but not assessed amounting to RM193,390, and the second is for the purported work under the variation orders in the sum in of RM83,538.49.

[71] The learned judge dismissed both these claims as he is not satisfied that the appellant had carried out the works in question. In making his finding, the learned judge took into consideration the absence of any verification by the engineer on the purported works. The learned judge also considered the fact that the claims were disputed by the respondent and that it has already paid the appellant the sum of RM1.27m based on the certificates issued by the engineer. The learned judge also doubted the appellant's claim as it was only made four years after the termination of the agreement.

[72] Learned counsel for the appellant firstly challenged the right of the respondent to terminate the contract on the ground of delay. He pointed out the delay was caused by the failure of the respondent to give effective vacant possession of the site to the appellant, and by reason thereof it is submitted that the respondent is not at all entitled to terminate the agreement when the appellant applied for further extension of time. At this point, I will say that the validity of the termination is never an issue before the trial court. It was never pleaded and did not form the basis of the appellant's claim herein.

[73] On the claim for works done, learned counsel contended that the appellant's claims were based on 'quantum meruit'. To justify such a claim reference was made to the Federal Court case of *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 where the claim for quantum meruit was allowed. In that case the respondent was employed by the appellant to build six units of shop houses. The respondent only completed five of the houses. The remaining unit was not completed because of the claim by the ground tenant. At the same time learned counsel also drew the court's attention to cl 23 of the agreement which imposed an obligation on the respondent, as an employer, to pay a fair price for the work actually done upon termination of the agreement. Learned counsel also made reference to the case of *Neale v Richardson* [1938] 1 All ER 753 where it was held that the refusal of the architect to issue certificate or the absence of certificate was no bar to the plaintiff's right to recover the balance of the money due for work done. I fully agree with the said proposition.

[74] On the fact, it is submitted that SP1 has explained in detail the works done by the appellant and that his evidence remained unchallenged in cross-examination. Learned counsel also relied on the evidence of the engineer ('SP2') who, according to him, did not dispute that there were works done which have not been assessed. Learned counsel for the respondent

on the other hand contended that the appellant's claims for the purported works done are illusionary and not substantiated by any material particulars.

[75] In my view, the main thrust of the appellant's appeal relates to the finding of fact by the learned judge that the appellant has not carried out the works in question. In determining the appeal of this nature it will be sufficient to refer to a passage in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, where Gopal Sri Ram JCA, said (at p 116):

> … Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[76] In *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781, the Federal Court held that this test of 'insufficient judicial appreciation of evidence' is consistent with 'the plainly wrong test' as a ground for appellate intervention. Further, in *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [2006] 2 MLJ 218, this court held that where the issue is on the credibility of witnesses, the appellate court must give great weight to the view formed by the trier of fact and not to differ from the view except in exceptional circumstances. The question is whether there was an insufficient judicial appreciation of evidence by the learned judge or that he was plainly wrong in coming to the finding that he made.

[77] In the present appeal it is not disputed that the agreement was terminated by the respondent under cl 23 thereof pursuant to its letter dated 20 April 1994. From the said letter, the termination was attributed to the failure on the part of the appellant to proceed with the construction works with due diligence as required by cl 22(a) of the agreement. The question is whether the appellant is entitled to recover on quantum meruit for work done upon termination of the agreement by reason of its own default. In *Lau Kee Ko & Anor v Paw Ngi Sui* [1974] 1 MLJ 21, the Federal Court dismissed the appellant's claim for work done on quantum meruit as the facts showed that he was at fault and had broken the contract. In so deciding the court adopted the restatement of the law by Balckburn J in *Roberts v The Bury Improvement Commissioner* (1870) LR 5 CP 310, at p 326, where His Lordship said that 'no person can take advantage of the non-fulfillment of a condition the performance of which has been hindered by himself'. In the present case the respondent has elected to terminate the agreement under cl 23 instead of determining the same under cl 22. By reason thereof, I am of the view that the appellant is entitled, by virtue of the said clause, for the payment of the fair price for the work actually done as claimed herein

notwithstanding that the appellant was guilty of the breach of the agreement. Such a finding is also in my view consistent with the decision of the Federal Court in *Tan Hock Chan v Kho Teck Seng*.

[78] However that is not the end of the matter. In order to succeed in both the claims, the appellant must show that the works to which the claims relate have been carried out. It is noteworthy that the particulars of the purported works were not specified in the pleading. The appellant merely averred that at the time of the termination, the respondent was indebted to the appellant in the sum of RM411,228.36, which the respondent has failed to satisfy in spite of the demand made by his solicitor. The nature and particulars of the claim was only disclosed by SP1, a partner of the appellant's firm, in his examination in chief by making specific reference to the two letters dated 24 December 1998 aforesaid. Upon perusal of the said letters, it appears to me that the said letters only showed the state of account under the agreement specifying the contract sum, the sum received and the value of the works completed and not completed without any material particulars on the nature and the type of works in question. Having considered these factors together with the fact that the claims were only made after a lapse of four years from the date of termination of the agreement, I find that the learned judge was amply justified in accepting the explanation given by the engineer of his inability or incapacity to conduct any verification of the appellant's claim.

[79] With regard to payment based on the valuation of work done, the Federal Court in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 followed the submission advanced in *Hudson's Building and Engineering Contracts* (11th Ed, 1995) (at para 6–194) that '… It is the essence of most interim payment provisions based on valuation of work done that the valuation relates to all the work done to date, not of the work since the last interim certificate'. It is to be recalled that cl 33 of the agreement provides that after the first payment, certificate shall be given monthly if required. In the instant appeal it is clear from the evidence that the engineer had from time to time issued the interim certificates of all works done. The last two certificates dated 27 May 1993 certified the sum of RM1,278,004.10 as the estimated value of contractor's work to date, with the interim balance of RM32,954.94 and RM1,296 respectively.

[80] It is also not disputed that the last extension period expired on 7 September 1993, and there was the evidence of SD1 which showed that the appellant had ceased all works by that date. SP2, the engineer, also testified that between the months of May 1993 to June 1994 the appellant did not submit to him any claim for work done. Further, the appellant in its letter dated 25 October 1993 to the respondent requesting for payment due under the previous interim certificates did not give any indication of any work

which has not been assessed. The evidence also showed that all sums so certified, save the sum of RM6,355 as claimed, have been fully settled by the respondent. After the issuance of the last interim certificate in May 1993, the appellant only submitted its claim for the purported works in December 1998. Having considered all these factors, I agree with the learned judge's finding that the appellant has failed to prove its claim for works done but not assessed under the agreement. It is not probable that the appellant has carried out any work after the issuance of the last interim certificate, or that there was any remaining work to be assessed at the material time. It is also my finding that there is nothing in the evidence of SP2, the engineer, which showed that the appellant had carried out the works in question as contended by learned counsel. What SP2 said was that even if the works were carried out he still could not make any verification of the same as the contract had been terminated. He did not at any time said that there were works done which have not been assessed following the termination.

[81] Further, upon close scrutiny of the particulars of the appellant's claim, it appears to me that the appellant did not specifically state the nature of the work alleged to have been completed but not assessed. Such omission in my view further weakens the appellant's case against the respondent. In conclusion, I will say that the issue here is not on the refusal of the engineer to issue certificate for work done, but whether or not the works to which the claims relate have actually been carried out by the appellant as alleged. It is my finding that the question has been correctly answered in the negative by the learned trial judge.

CLAIMS UNDER THE VARIATION ORDERS

[82] The learned judge has considered this claim together with the claims for works done above, and has dismissed the same on similar grounds. I fully agree with him. It is clear from the evidence that the appellant has failed on the balance of probability to prove that it has carried out the works in question or that the respondent has not made payment in respect thereof. Further it is to be noted that the appellant in its letter dated 24 December 1998 for payment under the variation orders made reference to the engineer's letters dated 30 October 1985 and 16 September 1986 for the claim of RM277,057.93. However it is apparent from the two letters that the total costs of the extra works are RM42,674 and RM146,428.85 respectively, making a total sum of RM189,102 only. This amount is much less than the sum of RM277,057.93 so specified in the claim. However there is another variation order as set out in the engineer's letter dated 22 October 1985 at the total extra cost of RM130,629.08 which was not referred to in the first mentioned letter above. Further, under cl 10(ii) of the agreement, the appellant, as the contractor, is required to forward to the respondent, as the

employer, two clear days at least before their ordinary meeting in any month, an account of the claims (if any) for carrying out such variations whether for work in progress or completed during the previous month. The discrepancies in the claims as aforesaid coupled with the said delay, in my view, further fortified the finding of the learned judge that the appellant has not actually carried out the works under the variation orders or that there was any sum remaining sum unpaid thereunder.

[83] For the reasons aforesaid, I am satisfied that there is cogent evidence to support the decision of the learned judge and as such there is no reason for this court to interfere. Consequently this appeal is dismissed with costs. The orders of the High Court are affirmed, and the deposit to be paid out to the respondent to account of taxed costs.

[84] My learned brother, Low Hop Bing JCA and Abdul Malik Ishak JCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by K Nesan